TANG KA LEONG v. YONG SIEW CHEN & ANOR

COURT OF APPEAL, KUCHING
SUPANG LIAN JCA
MOHD NAZLAN GHAZALI JCA
AZIZUL AZMI ADNAN JCA
[CRIMINAL APPEAL NO: Q-07-71-06-2023]
29 AUGUST 2023

Abstract – *By the terms of s. 50 of the Courts of Judicature Act 1964, there are two instances when a High Court's decision is not appealable to the Court of Appeal. Firstly, when the decision is made in the course of a trial. Secondly, when the decision does not dispose of the rights of parties with finality ('second category'). The application for leave to appeal against a decision of the High Court ordering a case to be remitted to the Magistrates' Court for a retrial, which has the capability of reviving the likelihood of attaching a liability upon the applicant, falls under the second category, making the application for leave to appeal liable to be dismissed.*

CIVIL PROCEDURE: *Appeal – Leave to appeal – Application for leave to appeal against decision of High Court ordering case to be remitted to Magistrates' Court for retrial – Whether decision appealable – Whether decision disposed of rights of parties with finality – Whether decision usurped prosecutorial discretion of Public Prosecutor – Whether High Court's powers of revision conferred by statutes – Courts of Judicature Act 1964, ss. 35 & 50*

At the Magistrates' Court, the putative appellant ('appellant') was charged under s. 44(1) of the Road Transport Act 1987 ('RTA') for the offence of driving a vehicle while under the influence of alcohol ('charge'), which caused a fatal accident that resulted in the death of the deceased. The Magistrate, after finding that (i) the prosecution (second respondent) had not adhered to the procedures as enumerated under s. 45F of the RTA in respect of a blood sample evidence alleged to be taken from the appellant; (ii) the prosecution had not called the medical officer who had extracted the blood sample from the appellant as a witness to explain on how the collection of the blood sample was carried out; (iii) there was a break in the chain of evidence regarding the blood sample evidence; and (iv) the prosecution failed to explain how the accident between the appellant and the deceased occurred, as a compact disc containing a closed-circuit television recording of the accident ('CCTV recording'), which was tendered as evidence, was unplayable during the trial of the case, and no effort was made by the prosecution to locate or procure any other copy of the CCTV recording, held

that the prosecution had failed to prove a *prima facie* case against the appellant. Hence, the appellant was acquitted and discharged from the charge ('Magistrates' Court's decision'). Dissatisfied by the Magistrates' Court's decision, and by the prosecution's refusal to file an appeal against the same, the mother of the deceased (first respondent), filed an application for revision pursuant to s. 323 of the Criminal Procedure Code ('CPC') to the High Court. The High Court, after considering that (i) the High Court's power of revision could be exercised to correct miscarriages of justice arising from incompetent investigations or prosecution; (ii) the conduct of the trial at the Magistrates' Court by the prosecution involved numerous omissions; (iii) the omissions had affected the correctness, legality or propriety of the Magistrates' Court's decision; and (iv) the Magistrates' Court's decision fell far below the reasonable expectations of fairness and justice to the complainant/victim and to the public for the upholding of public confidence in the administration of justice, ordered the case to be remitted back to the Magistrates' Court for a retrial, which was to commence from the stage of a plea of not guilty entered by the appellant ('High Court's decision'). Hence, the present application for leave to appeal to this court by the appellant ('application'). In support of the application, the appellant had, among others, raised the question of law of whether the exercise of powers of revision by the High Court had interfered with the prosecutorial discretion of the Public Prosecutor. Whereas the respondents, in objecting to the application, raised a preliminary objection of whether the application ought to be allowed, considering that by the terms of s. 50 of the Courts of Judicature Act 1964 ('CJA), the same was not competent as it was made in respect of a High Court ruling that was not appealable to the Court of Appeal.

Held (dismissing application)
Per Azizul Azmi Adnan JCA delivering the judgment of the court:

(1) Under s. 50 of the CJA, there are two instances when a decision of a High Court is not appealable to the Court of Appeal; (i) when the decision is made in the course of a trial; and (ii) when the hearing of a cause or matter does not dispose of the rights of the parties with finality. The present case fell within the second category. Although the Magistrates' Court's decision might have finality in the sense that it exculpated the appellant of the offence charged, the subject matter of the present application was the High Court's decision. The High Court's decision was to order a retrial of the case, and in so doing, the High Court had revived the likelihood of liability attaching to the appellant. This decision clearly had not disposed of the rights of the appellant, as the liability of the same would remain contingent upon a finding of guilt by the Magistrate Court at the end of the retrial. For these reasons, the application was dismissed. (paras 23-26)

(2) The powers of revision had been expressly granted to the courts by legislation. An order of retrial fell squarely within the orders that may be granted by the High Court in exercising its powers of revision that had been conferred not only by s. 323 of the CPC, but also by s. 35 of the CJA. Given that such powers had been conferred expressly by the statutes, the court failed to see how it could reasonably be argued that an order for retrial would amount to a usurpation of the prosecutorial discretion of the Public Prosecutor. (paras 27 & 28)

Case(s) referred to:
C Vignesh Kumar Chellapah & Anor v. PP [2019] 8 CLJ 591 CA ***(foll)***
Yong Siew Chen v. Tang Ka Leong & Anor [2023] 7 CLJ 40 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 3, 35, 50(1), (2)
Criminal Procedure Code, s. 323
Road Transport Act 1987, ss. 44(1), 45F

For the appellant - Yap Hoi Liong; M/s Yap Hoi Liong & Co
For the 1st respondent - Boston Ho Teck Howe; M/s Boston Alexander Advocs
For the 2nd respondent - Noorhisham Mohd Jaafar; DPP

[Editor's note: For the High Court judgment, please see Yong Siew Chen v. Tang Ka Leong & Anor [2023] 7 CLJ 40 (affirmed).]

Reported by Syamim Ariffin

JUDGMENT

Azizul Azmi Adnan JCA:

Introduction

[1] The putative appellant in this case, Tang Ka Leong, was charged at the Magistrates' Court for the offence of driving a vehicle under the influence of alcohol under s. 44(1) of the Road Transport Act 1987. It was alleged that the appellant had driven a car that was involved in a fatal road accident which resulted in the death of one Chipedo Lee. At the end of the prosecution's case, Mr Tang, the appellant, was acquitted and discharged. The public prosecutor did not appeal against this decision.

[2] On 24 October 2022, the first respondent before us, Madam Yong Siew Chen, applied to the High Court at Sibu for the court to exercise its powers of revision under s. 323 of the Criminal Procedure Code. Madam Yong is the mother of the late Chipedo Lee, who at the time of his passing was just 17 years old. The High Court, after hearing the submissions, allowed the revision application and directed that the case be sent for retrial. The putative appellant applied for the leave of this court to appeal against the decision of the High Court.

[3] After hearing oral submissions in this case, we dismissed the application for leave on a preliminary objection raised by the second respondent. We were of the view that the appeal would not have been a competent one, as the ruling of the High Court was not a "decision" within the meaning of s. 50(2) of the Courts of Judicature Act 1964, and hence could not properly be made the subject of an appeal to the Court of Appeal. We explain the reasons for our decision here.

Material Background Facts

[4] The appellant was alleged to have collided with a motorcycle being driven by the deceased along Persiaran Brooke in Sibu at 10pm on 16 May 2020. Evidence was adduced before the Magistrate that a blood sample, alleged to have been taken from the appellant, contained 162 milligrams of alcohol, well above the statutorily prescribed limit of 100 milligrams. At trial, the conduct of prosecution was undertaken by a police officer.

[5] Section 45F of the Road Transport Act 1987 provides for certain procedures to be followed when blood samples are taken from a suspect. The provision permits a certificate to be adduced in court to prove the proper collection of a blood sample (in which event the attending Government Medical Officer need not testify at trial), but such a certificate must have been given to the accused no later than seven days prior to trial. The accused may thereafter exercise his or her right to require the attendance of the medical officer.

[6] At trial, these procedures were not followed. Nor was evidence elicited from witnesses regarding the manner in which the collection of the blood specimen had been carried out.

[7] The prosecution called as a witness Ms Hii Suk Yun (PW6), who worked at an office located close to the scene of the accident. She testified that there was a closed-circuit television recording of the accident. She made a copy of the CCTV recording on a pen drive and had handed it to a police officer. At trial, a compact disc containing the CCTV recording was tendered to be admitted into evidence. Regrettably, the CD could not be played at trial and no effort was made to locate the pen drive or to procure any other copy of the CCTV recording.

The Findings Of The Magistrate

[8] The Magistrate found that a *prima facie* case had not been made out and acquitted and discharged the appellant. She found that:

(i) the failure to call the medical officer who had purportedly extracted the blood sample from the appellant; and

(ii) the failure to adhere to the procedures provided for in s. 45F of the Road Transport Act 1987, had resulted a break in the chain of evidence regarding the blood sample that had purportedly been taken from the

> appellant. She further found that the prosecution had also failed to provide an explanation of how the accident occurred in order to support the conclusion of the investigating officer that the appellant had driven the wrong way along the road in question. This was perhaps unsurprising given that the CCTV evidence – which could have established what had actually happened – was not before the court.

[9] As explained earlier, the prosecution did not appeal against the order of acquittal entered by the Magistrate.

The Findings Of The High Court

[10] Following receipt of Madam Yong's letter, Wong Siong Tung J exercised the powers of the High Court under s. 323 of the Criminal Procedure Code and called for the record of the proceedings before the Magistrates' Court to be examined by him. In a comprehensively written judgment[1], Wong J considered the powers of the court in revision proceedings, concluding that the powers of revision may exceptionally be exercised to correct miscarriages of justice arising from incompetent investigations or prosecution of a charge that has resulted in the acquittal of an accused. He further closely examined the record of the proceedings before the Magistrates' Court and concluded as follows:

> Given the numerous omissions in this case which is unacceptable, the Court finds the conduct of the trial for the offence in question by the prosecution and investigation officer (PW8) to be perfunctory and lethargic.

[11] These omissions, in the opinion of Wong J, affected the correctness, legality or propriety of the order recorded by the Magistrates' Court which – and we are inclined to agree – fell far below the reasonable expectations of fairness and justice to the complainant/victim and to the public for upholding public confidence in the administration of justice.

[12] Wong Siong Tung J ordered the case to be remitted to the Magistrates' Court for a retrial of the charge against the appellant, which was to commence from the stage of the not guilty plea entered by the appellant. The eight witnesses that were called were permitted to be recalled, if thought necessary by the prosecution, and the prosecution was also granted liberty to call any additional witnesses as it considered fit.

The Grounds In The Present Appeal

[13] Counsel for the appellant correctly observed that s. 50(2) only permits questions of law to be raised in the present appeal. These questions of law must have arisen in the course of the revision proceedings at the High Court, and the determination by the High Court must have affected the event of the revision.

[14] Eleven questions of law were raised. They may conveniently be summarised as follows:

(i) whether the exercise of the powers of revision by the High Court interfered with the prosecutorial discretion of the Public Prosecutor;

(ii) whether the sentence or order passed by the Magistrate was improper or illegal in the sense that it was contrary to law;

(iii) if the sentence of the Magistrate was not contrary to law, then whether the High Court had committed an abuse of its own process to order a retrial;

(iv) whether the revisionary powers of the High Court had been exercised judiciously;

(v) whether Madam Yong was possessed of a statutory right to interfere with the prosecutorial discretion whether or not to appeal against the decision of the Magistrate;

(vi) whether the revision application amounted to a back-door attempt to question the order of acquittal and discharge of the appellant;

(vii) whether the High Court erred in law in allowing the prosecution to recall previous witnesses with a view to repair and improve the prosecution's case;

(viii) whether the prosecution should be allowed to be a given a second bite of the cherry by the order of retrial;

(ix) whether the High Court had misdirected itself in law to order a retrial due to the flagrant incompetence of the prosecution;

(x) whether the High Court erred in law in failing to consider the fairness of a trial in exercising its powers of revision; and

(xi) whether the appellant will have been accorded a fair trial by the order of retrial.

The Preliminary Objection Raised By The Second Respondent

[15] The Deputy Public Prosecutor acting for the second respondent raised a preliminary objection. According to En Noorhisham, by the terms of s. 50 of the Courts of Judicature Act 1964, leave ought not to be granted because the appeal would not be competent in that it would not be made in respect of a ruling of the High Court that was appealable to the Court of Appeal.

Analysis And Decision

[16] We upheld the preliminary objection raised by the learned Deputy Public Prosecutor. In our judgment, the decision of the High Court to order a retrial was not a decision that finally disposed of the rights of the appellant

within the meaning of the definition of that expression in s. 3 of the Courts of Judicature Act 1964. As such, any appeal from this decision would not come within the ambit of s. 50(2) of the Courts of Judicature Act 1964.

[17] Section 50(2) provides for the jurisdiction of the Court of Appeal to hear criminal appeals in respect of cases that had been commenced at the Magistrates' Court. It reads as follows:

> (2) An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal, against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrates' Court by such appeal shall be confined to only question of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.

[18] The term "decision" is defined in s. 3 of the Courts of Judicature Act 1964 in the following terms:

> In this Act, unless the context otherwise requires:
>
> ....
>
> "decision" means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties;

[19] The key and determinative question was therefore, was the decision of Wong Siong Tung J to order retrial a "decision" for the purposes of s. 50(2) and within the meaning of the definition of that term in s. 3? Specifically, did the order for retrial come within the exclusion clause within the definition of "decision".

[20] It may be observed that the decision of the High Court was clearly not one that was made in the course of a trial. It was made in a hearing for a revision.

[21] The proper construction of the term "decision" in the context of s. 50 was considered by this court in the case of *C Vignesh Kumar Chellapah & Anor v. PP* [2019] 8 CLJ 591; [2020] 1 MLJ 512. In that case, the appellants were the solicitor and in-house counsel for a company that had been involved in illegal deposit-taking. The company's assets had been seized under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001. The appellants in that case claimed that they were respectively owed legal fees and salary by the company, and sought to be paid out of its seized assets. For this purpose, they made an application to the High Court. The High Court dismissed the application without hearing it on its merits, ruling that the application ought to have been first made to the Sessions Court, which had earlier convicted the three directors of the company in question. The appellants in that case then appealed to the Court of Appeal.

[22] The Court of Appeal upheld a preliminary objection raised by the Deputy Public Prosecutor in that case, holding that the appeal did not come within the scope of s. 50(1), as the ruling of the High Court was not a decision that had finally disposed of the rights of the parties. Rhodzariah Bujang JCA (as Her Ladyship then was), in delivering the judgment of the court, stated as follows:

> [6] It is clear from the said definition in s. 3 that there are two instances when a decision of the High Court is not appealable. **The first is if it is made in the course of a trial and the second is when the hearing of the cause or matter does not dispose of the rights of the parties with finality**. The clear intention of the Legislature expressed from the words used in the aforesaid section is to filter matters that can go up on appeal. In other words, a cap has been placed by the Legislature to ensure that appeals filed are not frivolous and there would not be undue delay in the disposal of trials by reason of such appeals being filed. Therefore, even though the order of the court was not made in the course of the trial, but if it does not dispose of the rights of the parties with finality, that decision is still unappealable, that is to say, there is no automatic right of appeal for such a decision made by the court. To say otherwise would run afoul of the clear intention of the Legislature as expressed in the said s. 3, which as we had stressed earlier, is to filter matters which can be further taken up on appeal before us.
>
> [7] Thus, in this case, although the application was not filed and the decision made was not in the course of a trial, nevertheless it does not finally dispose of the rights of the appellants because the order of the learned High Court Judge was only to direct that the application be filed in the Sessions Court where as rightly pointed out by the learned High Court Judge, the source for payment of the claim, that is, the forfeited property was. (emphasis added)

[23] We considered ourselves bound by the decision of the Court of Appeal in *C Vignesh Kumar Chellapah & Anor v. PP*, which decided that there are two instances when a decision of a High Court is not appealable: the first is when such a decision is made in the course of trial, and the second is when the hearing of a cause or matter does not dispose of the rights of parties with finality.

[24] The present case before us fell within the latter category.

[25] The acquittal by the Magistrate may have had finality in the sense that it exculpated the appellant of the offence charged. But the acquittal was a decision of the Magistrate, which was not the decision that was the subject matter of the present appeal. The decision by the High Court was to order a retrial of the matter, and in so doing, the High Court revived the likelihood of liability attaching to the appellant. This decision clearly did not dispose of the rights of the appellant, as the liability of the appellant remained contingent upon a finding of guilt by the Magistrate at the end of the retrial.

[26] For these reasons, the application for leave to appeal was therefore dismissed.

[27] As we have upheld the preliminary objections raised by the Deputy Public Prosecutor in this case, we did not consider it necessary to address all the points advanced on behalf of the appellant relating to the merits of the application for leave. We would however observe that the powers of revision have been expressly granted to the courts by legislation, and that an order of retrial falls squarely within the orders that may be granted by the High Court in exercising its powers of revision that have been conferred not only by s. 323 of the Criminal Procedure Code, but also by s. 35 of the Courts of Judicature Act 1964, the latter of which reads as follows:

> 35 General supervisory and revisionary jurisdiction of High Court
>
> (1) In addition to the powers conferred on the High Court by this or any other written law, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts, and may in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested, at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof, and may remove the same into the High Court or **may give to the subordinate court such directions as to the further conduct of the same as justice may require**.
>
> (2) Upon the High Court calling for any record as aforesaid all proceedings in the subordinate court in the matter or proceeding in question shall be stayed pending further order of the High Court.
>
> (emphasis added)

[28] Given that such powers have been conferred expressly by statute, we fail to see how it may be reasonably argued that an order for retrial amounts to a usurpation of the prosecutorial discretion of the Public Prosecutor.

Endnote:

1. Reported as *Yong Siew Chen v. Tang Ka Leong & Anor [2023] 7 CLJ 40*